IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 37 OF 1992

Budhu Baldev Yadav, since deceased
through Heirs and legal representatives
Rajbahadur son of Budhu Yadav
& Ors. ..Petitioners

versus

D. S. Rajpurkar, Court Receiver
High Court, Bombay & ors. ..Respondents

Mr. M. M. Vashi for the Petitioners.

Mr. A.I.I. Patel for the Respondent No.1

Mr. R. Thorat i/b. Mr. M. J. Shetty for Respondent No. 13.

CORAM : D. G. DESHPANDE, J.

DATE : 5TH OCTOBER, 2006

ORAL ORDER :

1. Heard learned counsel for the parties.

2. Petitioners are the tenants. By this petition they are challenging the orders of the Small Causes Court, Mumbai in Suit No. 1854 of 1970, by which the suit of the plaintiffs for eviction was decreed with costs. The petitioners

have also challenged the subsequent order of the Additional Chief Judge in Appeal No. 103 of 1983 by which the appeal was dismissed and the petitioners were directed to hand over possession of the premises being shop No.4 situate at House No. 96 Kadri Park, Vile Parle (West), Bombay 400 056, within three months from that date. Original suit for eviction before the Small Causes Court was filed by the Court Receiver and there were two defendants to the suit, viz. M/s. Mahavir & Co. a sole proprietary firm of which defendant No.2 Budhu Baldev Yadav was the proprietor. It was filed on the ground of defendants remaining in arrears of rent and also for subletting of the premises to defendant No.2. Findings in both these regards were in favour of the landlord, and they were confirmed by the appellate court.

3. Admittedly, the court receiver came to be appointed pursuant to the order of this court dated 27.1.1967 and 26.8.1971 in Original Side Suit No. 676 of 1966. Prior to the filing of the suit, notice dated 26.12.1969 was served upon the tenant. So far as this notice is concerned, it was contended by Mr. Vashi that it was addressed to the defendant

No.1 Mahavir & Co. and not to the defendant No.2, its proprietor, and, therefore it is not legal notice nor a valid notice. This notice was sent by registered post to the defendant No.1 and it was received by the defendant No.2 for Mahavir & Co. - Defendant No.1. He was admittedly the proprietor of the defendant No.1.

4. The contention of Mr. Vashi that the notice being illegal or invalid, was rightly rejected by both the courts below.

5. In order to find out as to what were the contention of the plaintiffs and the defendants before the trial court, it is necessary to reproduce the issues framed by the trial court along with their findings. Therefore, I am reproducing those issues:

Issues and Findings:

1. Do Plaintiffs prove that the defendant no.1 fell in arrears of rent from 1/3/69 to 30/11/1969 at Rs.40-17 ps. per month?

   Yes.

5(a) Is it proved that defendant No.1

neglected to pay the said arrears within one month of the notice under Sec. 12(2) of the Bombay Rent Act?

Yes.

5(b) Do defendants prove that Deft. No.1 lawfully tendered or paid any amount towards the arrears?

No.

5(c) Is defendant No.1 ready and willing to pay the standard rent?

No.

2. Do plaintiffs prove that defendant No.1 have unlawfully sublet the suit premises to defendant No.2?

Yes.

6. Does defendant No.2 prove that the defendant No.1 lawfully transferred their business along with tenancy rights under the deed of assignment dt. 20/8/1969?

No.

3. Do plaintiffs prove that the monthly tenancy of the defendant No.1 was duly terminated by notice to quit dated 26/12/1969?

Not necessary.

4. Are the plaintiffs entitled to evict the defendants from the suit premises and for a decree for possession of the same?

Yes.

7. What order and decree.

As per final order.

Issue No.2 is about illegal and unlawful subletting of the suit premises to the defendant No.2 by defendant No.1 and the finding is in favour of the plaintiffs. Issue No. 6 is about lawful transfer of of business by defendant No.1 to 2 along with tenancy rights and the finding is against the defendants.

6. From the aforesaid issues, it is clear that right of the plaintiffs to file a suit is not under challenge. Service of notice is not disputed, non payment of rent is proved, tender of rent not proved.

7. Regarding this validity of the notice, court reproduced part of the written statement or point of defence of the defendant No.2 as under:

> **"Denies termination of tenancy and says that the notice dated 26/12/1969 is bad in law."**

In view of this finding, the trial court was fully justified in concluding that there is no dispute about receipt of the notice. Apart from this

contention of the defendants that the notice is bad in law, his vague contention that there could be numerous reasons why notice is bad in law. But being a civil suit, it was necessary for the defendant to clarify and spell out what were the illegalities in the notice. Now the contention of the petitioners that notice was not sent to defendant No.2 is of no consequence. Defendant No. 1 was a proprietary concern. Defendant No.2 was its sole proprietor and as such addressing notice to defendant No.1 and its receipt by defendant No.2 is full and proper compliance of all the requirements of law. Admittedly, there has to be some owner of the proprietary concern and proprietary concern acts through some human being. Therefore, when defendant no. 2 was the sole proprietor addressing notice to Mahavir & Co,. and its receipt by defendant No.2, was a proper service.

8. I asked Mr. Vashi to show the written statement of the defendant No.2 in order to find out the specific plea raised. He had shown me the written statement but nowhere in the written statement the defendant raised any specific pleas about the notice being bad in law and his defence

particularly that notice ought to have been served upon the defendant No.2 separately, is not at all raised in the said points of defence. The second question is about the defendants being in arrears. In that regard the case of the defendant he offered to pay rent to the Rent Collector of the plaintiff No.1 i.e. the Court Receiver and had sent arrears of rent by money order, but the Court Receiver refused to accept the money order and the same were returned. However, admittedly the defendant - petitioner could not produce the money order coupons or any document in this regard of sending the money orders or its refusal. His case was that all those documents were burnt in a accidental fire that took place one year after the assignment. The trial court found story difficult to digest and believe as no evidence of premises catching any fire, report to the police or to the fire brigade, panchnama of the fire was ever tendered or produced by the petitioners.

9. Story of refusal is also difficult to be believed because the demand of rent was made by the Court Receiver who was duly empowered and authorised to do so and the Court Receiver has no personal

interest in the matter. He had obviously no reason to refuse to accept the money orders.

10. Further, the trial court also found that story of the documents got burnt in the fire is an after thought of the petitioners - tenants. While considering this aspect, the trial court observed as under:

> **"If the Money Order coupon was destroyed, the same would not be a document in possession of the defendant at the date of either of the written statements (including the amended written statement) and therefore story belatedly made out in the course of evidence appears to be unreliable and cannot be accepted. Lastly, the defendant No.2 Budhu Baldev Yadav gave his evidence on two dates. Firstly, he was examined on 26th October 1982 in which a reference was made to the Money order having sent on receipt of the notice but on that day he was not in possession of money order coupon, the matter was then adjourned at his request and it is only on the adjourned date namely 9/11/1982 the story of accidental fire was put forth by the defendant. The court therefore was fully justified in rejecting that story."**

11. The court also noted that the defendant No. 2 did not make any application for fixation of standard rent within one month of the said notice, therefore also that case cannot fall under sub section (b) of section 12(3) of the Bombay Rent Act. Similar view was taken by the appellate court after

threadbare discussion of the pleadings of the parties and evidence tendered on record. Both the judgments are therefore perfectly sound, well reasoned, there is absolutely no perversity and therefore, there is no merit in this petition and the petition is liable to be dismissed.

12. It is to be noted and I have already discussed that the defendant No.1 was a proprietary firm of which defendant No. 2 was the sole proprietor, in that view of the matter, whether the defendant no. 1 was the tenant. Secondly, subletting of the premises by the defendant No.1 to the defendant No.2 is also nothing but an attempt to avoid the legal consequences. Sole proprietary concern transferring the tenancy rights to the proprietor or vice versa is nothing but transfer by one individual to himself in other capacity. Transferor and transferee are actually and factually one and the same in such a situation and therefore the defendants cannot be permitted to take advantage of any such transfer.

13. From the judgment of both the courts below, it is clear that all aspects of the matter including

all the issues as framed by the trial court and reproduced above and all the issues as considered and decided by the appellate court in the form of points for decision are based on sound reasoning and proper appreciation of evidence. No interference is called for. Hence, Petition is dismissed. Rule is discharged. Stay, if any stands vacated.

(**D.G. DESHPANDE, J.**)